UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 46 | Number 3 Article 11

4-1-1968

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the presence of the third person? Thirdly, if the court had determined the child competent as a third person, the problem of whether both the child and husband could testify would arise. The better view appears to be that the privilege is completely destroyed as to a conversation made in the known presence of a third person and therefore the husband should be allowed to testify via the tape recordings. North Carolina follows the rule that the third person either known or unknown to the spouses may testify, but whether the spouse may in turn testify once the actual presence of a third person has been established has not been decided.[54]

A court should be zealous in protecting the privilege of confidential communications which is intended to secure the perfect confidence and trust which should characterize the relation of husband and wife. However, the privilege protects *only* the institution of marriage. It seems that the court in *Hicks* viewed the privilege as covering the familial unit. The fact that the spouses intend their conversations to be private and confidential seems immaterial when spoken in the known presence of a third person, even if that third person is a child. The court possibly considered the child such an integral part of the marriage that she should not be considered a third person. The real problem with the case is the failure of the court to articulate the reasons for its decision, resulting in considerable ambiguity as to its actual holding.

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Federal Jurisdiction—Realignment—Antagonism Test Extended

Multiple-party actions in the federal courts are susceptible to dismissal for want of jurisdiction because of the rule of complete diversity requiring that no plaintiff be a citizen of a state of which a defendant is a citizen.[1] The jurisdiction of the federal courts over suits "between citizens of different states"[2] seemingly contradicts the basic tenets of federalism, for these suits involve rights grounded

[54] Note 40 *supra.*

[1] Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).
[2] 28 U.S.C. § 1332(a)(1) (1964).

in state law cognizable in state courts.[3] The federal courts have been sensitive to this contradiction and have sought to "scrupulously confine their own jurisdiction to the precise limits which the [Judiciary Acts have] defined."[4] In multiple-party actions, therefore, the courts have been obliged to ignore the arrangement of the parties on the pleadings and to take upon themselves the duty of realigning the parties "according to their sides in the dispute."[5] The commonly accepted test for realignment is the "real" or "ultimate" interests of the parties.[6] This refers to the parties' interests *at law* which may or may not coincide with their interests *in fact*. In the case of corporations and their shareholders, however, the courts have recognized that common interests and a common stance on the litigation do not always follow from common interests at law. In a stockholder's derivative action the corporation will not be realigned as a party plaintiff if the court finds that it is under control "antagonistic" to enforcement of the claim.[7] In this class of actions the federal courts have substituted antagonism between the parties for the pattern of legal interest as a basis for alignment and have thereby created an exception to the ultimate interest test.[8]

This exception was expanded to non-stockholder actions in the

[3] [Diversity jurisdiction] poses the deepest issue of the uses of the federal courts. In these instances the jurisdiction is employed not to vindicate rights grounded in the national authority but solely to administer state law. . . . The problem is, therefore, whether this exceptional judicial undertaking rests on some present, valid, federal purpose. If not, it is a function that should plainly be surrendered. . . .
Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 235 (1948). Exercise of diversity jurisdiction has occasioned considerable soul-searching among legal scholars. A furious debate has raged over the question of whether the federal courts should continue to exercise jurisdiction over cases grounded in diversity. *see* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 892-97 (1953); C. WRIGHT, FEDERAL COURTS § 23 (1963) [hereinafter cited as WRIGHT]; Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 22-28 (1948); Friendly, *The Historic Basis of the Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 873-76 (1931).

[4] Healy v. Ratta, 292 U.S. 263, 270 (1934); *accord*, Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 77 (1941).

[5] Dawson v. Columbia Ave. Trust Co., 197 U.S. 178, 180 (1905).

[6] 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 26 at 145-46 (Wright rev. 1960); WRIGHT § 30 at 83 (1963).

[7] Smith v. Sperling, 354 U.S. 91 (1957); Venner v. Great Northern Ry. Co., 209 U.S. 24 (1908); Doctor v. Harrington, 196 U.S. 579 (1905); De Pinto v. Provident Sec. Life Ins. Co., 323 F.2d 826, 831 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964).

[8] WRIGHT § 30 at 83.

recent case of *Reed v. Robilio*.[9] The Sixth Circuit Court of Appeals refused to accept the identity of interest at law between an executor and the sole heir as conclusive of alignment in an action brought on behalf of the estate. The court held that the antagonism of the executor to the heir's claim precluded realignment of the executor as a party plaintiff.[10] The plaintiff in *Robilio* was a citizen of New York. Contending that the sum paid for her deceased father's interest in a foods-processing partnership was grossly inadequate,[11] the plaintiff demanded that the executors of her parents' estates bring suit against the purchasers, her father's former partners and their relatives. The executors refused to sue whereupon she brought this action alleging breach of a partner's fiduciary duty. The executors, citizens of Tennessee, were joined with the individual defendants, also citizens of Tennessee. Although the complaint alleged no wrongdoing on the part of the executors and sought no relief against them, both filed answers which denied the allegations of the complaint and asserted fairness of the transaction as an affirmative defense.[12] During the trial, the executors acted as parties adversary to the plaintiff.[13]

The jurisdictional issue was not raised until the fifth week of the trial on the trial judge's own motion.[14] The district court concluded that the conduct of the executors was "inexplicable"[15] but that it

[9] 376 F.2d 392 (6th Cir. 1967), *rev'g* 248 F. Supp. 602 (W.D. Tenn. 1965).

[10] In the district court, the plaintiff joined the executor of her father's estate, Planters National Bank of Memphis, and the executor of her mother's estate, an attorney; but the executor of the mother's estate was discharged prior to the appellate argument, and the court of appeals ordered dismissal of the action as to him. 376 F.2d at 394. Thus only the bank's position in the litigation was at issue before the court of appeals.

[11] Pursuant to the father's will the bank as his executor undertook to sell his interest in the partnership. Its trust officer negotiated the price and the terms of the sale to the real defendants; the sale, and certain new partnership terms, were approved by the plaintiff's mother, acting upon the advice of the attorney who ultimately became her executor. 248 F. Supp. at 604.

[12] 376 F.2d at 393.

[13] *Id.* The executors submitted interrogatories to the plaintiff, objected to the testimony of her witnesses and argued against her on points of law. The bank went so far as to put its trust officer on the stand to testify in support of the real defendants' position. 248 F. Supp. at 616.

[14] 248 F. Supp. at 605.

[15] No reason is assigned in either decision for the hostility of the executors to plaintiff's claim on behalf of the estates. While the cause of the antagonism is unknown, it is possible that the bank and the attorney were motivated at least in part by a desire to protect their professional reputations. The bank's trust officer actually negotiated the sale and obtained the price which plaintiff attacked as "grossly inadequate." The other executor

was "not determinative of the jurisdictional issue."[16] The court then realigned the executors as parties plaintiff according to the ultimate interest test and dismissed the action.[17]

In reversing and remanding the case the court of appeals acknowledged the prevalence of the ultimate interest test but refused to deem it controlling.[18] The court relied on the decision of the Supreme Court in *Smith v. Sperling*[19] and drew an analogy between the heir-executor situation in *Robilio* and the stockholder-corporation situation in *Sperling*.[20] According to the court of appeals, *Sperling* stands for two propositions: first, that the relevant test in the stockholder situation is whether the corporation is antagonistic to the enforcement of the claim and second, that the refusal of the corporation to sue is evidence of that antagonism.[21] Both criteria were found to be present in *Robilio*. The court noted that the rule obtaining in stockholders' suits "is not far removed" from the rule applicable in other derivative actions.[22] Finding that the rule of *Sperling* could be applied to the situation in *Robilio*, the court of appeals declined to limit *Sperling* to stockholders' derivative suits until the Supreme Court had done so.[23]

The court's extension of *Sperling* to a non-stockholder situation is not necessarily precluded by other Supreme Court decisions on realignment which have utilized the ultimate interest test. A trustee and his beneficiary,[24] a lessor and his co-lessor,[25] a mortgagee and its mortgagor,[26] and a parent corporation and its subsidiary,[27] all

advised (or at least permitted) plaintiff's mother to accept the price. Possibly they interpreted the attack on the transaction as an attack on their professional competency and reacted accordingly. *See* note 11 *supra*.

[16] 248 F. Supp at 616.

[17] Especially when the nominal defendants, as here, are fiduciaries, will the Court presume that their interests coincide with the interests of the decedents' estates. It will take more than a showing of personal, hostile attitudes to displace this presumption.

Id.

[18] *Id.* 376 F.2d at 394.

[19] 354 U.S. 91 (1957).

[20] 376 F.2d at 395.

[21] *Id.*; *see* Smith v. Sperling, 354 U.S. 91, 97 (1957). Justice Frankfurter's dissent in *Sperling* was directed against the second proposition, 354 U.S. at 105.

[22] 376 F.2d at 395.

[23] *Id.* at 395-96.

[24] Hamer v. New York Rys. Co., 244 U.S. 266 (1917).

[25] Lee v. Lehigh Valley Coal Co., 267 U.S. 542 (1925).

[26] Dawson v. Columbia Ave Trust Co., 197 U.S. 178 (1905).

[27] Niles-Bement-Pond Co. v. Iron Moulders' Union, 254 U.S. 77 (1920).

of whom had the same legal interests as against the real defendants, have been realigned so as to oust jurisdiction. In none of these cases, however, were the parties actually antagonistic to each other. The possibility of antagonism was negated by findings of collusion to create jurisdiction where it otherwise would not exist.[28] The assertion by the plaintiff of a claim which is properly the claim of the nominal defendant has supported a finding of collusion,[29] as has a request by the nominal defendant in his answer that the prayer for relief be granted.[30] Admission in the complaint that a party has been joined as a defendant because joinder as a plaintiff would defeat diversity has been taken as an admission of collusion.[31] These cases suggest that the Supreme Court has consistently applied the ultimate interest test where the facts of the case create a suspicion that the parties have collusively arranged alignment so as to confer jurisdiction on the federal courts. It may be said that the ultimate interest test, as applied, is a defensive device to defeat collusive expansion of diversity jurisdiction.[32]

The antagonism test developed in the stockholders' cases takes a functional approach to the problem of alignment. Antagonism, for the purposes of alignment, is not the subjective state of hostility or

[28] In Dawson v. Columbia Ave. Trust Co., 197 U.S. 178, 180 (1905), the Court found that a suit brought by a mortgagee to compel a Georgia city to perform its contract with the Georgia mortgagor was brought "solely for the purpose of reopening in the United States Court a controversy which had been decided against it in the courts of the State," and ordered dismissal.

[29] *See* Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941) (mortgagee sought to establish that a lease given by the mortgagor was binding upon the assignee of the lessee); Niles-Bement-Pond Co. v. Iron Moulders' Union, 254 U.S. 77 (1920) (parent corporation sued to enjoin the union from employing violence and intimidation in a strike at a subsidiary's plant); Hamer v. New York Rys. Co., 244 U.S. 266 (1917) (bondholders sued to enforce a judgment which the trustee had secured against the defaulting issuer).

[30] Hamer v. New York Rys. Co., 244 U.S. 266, 274 (1917).

[31] Lee v. Lehigh Valley Coal Co., 267 U.S. 542, 543 (1925).

[32] In two cases involving similar fact situations, the Supreme Court invoked the ultimate interest test to *preserve* federal jurisdiction where it would not exist if the antagonism test were applied. Sharpe v. Bonham, 224 U.S. 241 (1912) and Helm v. Zarecor, 222 U.S. 32 (1911) involved a dispute over church properties between the national Presbyterian Church in the United States and a dissident group of Tennessee Presbyterians. The parties whose alignment was at issue were the holders of legal title to the properties. In both cases, they were members of the "national" faction. Notwithstanding their personal antagonism to the dissidents, the title holders were aligned with them in actions brought by out-of-state members of the national faction. The Supreme Court refused to permit alignment, holding that the title-holders were at law neutral stakeholders in the dispute and should not be realigned as parties plaintiff so as to destroy diversity.

personal animosity but the objective fact of "real collision" between the parties[33] as revealed "by the pleadings and the nature of the dispute."[34] The Supreme Court has attempted neither to delve into the motives of corporate directors nor to determine whether they harbor personal animosity toward the complaining stockholder.[35] Instead the Court has looked to the conduct of the management and to the position they have taken on behalf of the corporation in the pleadings. The refusal of directors to sue[36] and the denial of an opportunity for the complaining stockholder to present his charges to the directors have been held to constitute sufficient antagonism to defeat realignment.[37] Antagonism may also be established if the corporation unites with the real defendants in filing pleadings which deny the plaintiff's charges of wrongdoing.[38] In short, "There is antagonism whenever the management is aligned against the stockholder and defends a course of conduct which he attacks."[39]

Judicial acceptance of *Robilio* need not abrogate ultimate interest as the general test for realignment. The ultimate interests of the parties will continue to be the basis for realignment but with an exception recognized where antagonism is actually present. In *Robilio* the sterile application of the ultimate interest test would have created a danger of substantial injustice to the plaintiff. The effect of the district court's decision would have been to compel the New York plaintiff to bring her action in the courts of Tennessee. With the Tennessee executors and defendants vigorously denying the unfairness of the transaction, the possibility of prejudice to plaintiff's claim cannot be overlooked. There can be little doubt that the "matter in controversy" was in reality "between citizens of different states."[40] Application of the antagonism test merely recognized the existence of that controversy and preserved federal jurisdiction in an appropriate situation.

WILLIAM V. MCPHERSON, JR.

[33] Smith v. Sperling, 354 U.S. 91, 97-98 (1957).
[34] *Id.* at 97.
[35] The Court noted in *Sperling* that the refusal to take action which constituted antagonism might have been made "for any number of reasons." 354 U.S. at 96.
[36] 354 U.S. at 95.
[37] Doctor v. Harrington, 196 U.S. 579, 588 (1905).
[38] Venner v. Great Northern Ry., 209 U.S. 24, 32 (1908).
[39] Smith v. Sperling, 354 U.S. 91, 95 (1957).
[40] 28 U.S.C. § 1332 (1964).